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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 459

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioner,

v.

FEDERAL POWER COMMISSION, ET AL.,

Respondents

No. 473

THE UNITED GAS IMPROVEMENT COMPANY, PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION, ET AL.,

Respondents

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE ALABAMA LEAGUE OF MUNICIPALITIES, AND BRIEF.

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CITATIONS

Cases:

Atlantic Refining Company, et al., v. *Public Service Commission of the State of New York*, 360 U. S. 378 (1959)	7, 8, 9, 10
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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF THE ALABAMA LEAGUE OF MUNICIPALITIES FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Alabama League of Municipalities, an association composed of two hundred fifty-five (255) incorporated cities

and towns in the State of Alabama, respectfully files this Motion for Leave to file an Amicus Curiae Brief in support of Petitions for Certiorari in causes No. 459 and No. 473 on the docket of this Court. In support of such motion movant respectfully shows:

1. Consent has been obtained from Petitioners, The United Gas Improvement Company, Philadelphia Electric Company and the Public Service Commission of the State of New York for the filing of such brief; but, although requested to do so, the respondents which have answered the request have refused to agree that it may be filed.

2. The issue involved in the instant case relates to the prices charged for natural gas by producers to pipeline companies and the duty of the Federal Power Commission to assure that such prices are just and reasonable at the time the Commission issues a certificate of public convenience and necessity to the producers to make a sale of natural gas. If the prices of the producer to the pipeline company are not just and reasonable, then this price perforce is paid by the consumer because the pipeline company passes it on to the distribution company which in turn must pass it on to the consumer.

3. The movant is an organization composed of 255 municipalities, which include thousands of consumers who must rely upon natural gas to heat their homes, cook their food and so forth. Thus, movant should be permitted to present the viewpoint of the consumers since it is these consumers who will ultimately pay any unjust or unreasonable charges for natural gas.

4. For these reasons movant believes that they have a very real and relevant interest in this case, insofar as the questions presented in the petitions for certiorari are concerned.

WHEREFORE, it is respectfully moved that this motion to file a brief *Amicus Curiae* be granted and the brief, in the form attached be received.

ALABAMA LEAGUE OF MUNICIPALITIES.

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BRIEF AMICUS CURIAE OF THE ALABAMA LEAGUE OF MUNICIPALITIES

Opinions Below

The opinion of the United States Court of Appeals is not yet reported, (see decision printed in Petitions of the New York Public Service Commission (No. 459) as Appendix A,

pp. 1-8; and The United Gas Improvement Company and Philadelphia Electric Company (No. 473) as Appendix A, pp. 18-25). The opinion of the Federal Power Commission (R.481-555) is reported at 20 FPC 264 (1958); the Commission's order denying rehearing (R. 602-610) is reported at 20 FPC 571 (1958).

Jurisdiction

The asserted grounds for jurisdiction are set forth in the Petitions of the New York Public Service Commission and The United Gas Improvement Company and Philadelphia Electric Company.

Questions Presented

The questions are presented in the Petitions of the New York Public Service Commission and The United Gas Improvement Company and Philadelphia Electric Company.

Statutes Involved

The applicable provisions of the Natural Gas Act, June 24, 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, are printed at pp. 28-34 in Appendix B of the Petition of The United Gas Improvement Company and Philadelphia Electric Company.

Interest of Amicus Curiae

The Alabama League of Municipalities is an association composed of two hundred fifty five (255) incorporated cities and towns in the state of Alabama.

This brief is filed pursuant to Rule 42 of this Court.

The issues presented by the instant case vitally affect every municipality in the United States which purchases natural gas for its own consumption, or whose residents are

consumers of natural gas. If price regulation is not effectively provided at the Federal level, local regulation of gas rates is seriously hampered. The principal purpose of the Natural Gas Act was to prevent such a regulatory gap.

The League's interest *amicus curiae* in the instant case arises from the fact that the judgment of the Court below, if not promptly corrected in this Court, will substantially impair the principles established by the recent decision of this Court in *Atlantic Refining Co., et al. v. Public Service Commission of the State of New York*, 360 U.S. 378 (1959).

This decision, together with the decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954) are of fundamental importance to the gas consumer. *The Phillips* decision held that the Federal Power Commission has jurisdiction to regulate the rates of producers for sales of natural gas for resale in interstate commerce; the *Atlantic Refining* case provides a very necessary supplement to that decision, holding that rates for new field sales of gas subject to the Commission's regulatory control, must be supported by evidence showing their necessity to the present and future public interest, and must be subjected to a "most careful scrutiny and responsible reaction" by the Commission before being unconditionally imbedded in the natural gas pricing structure.

The requirements laid down in *Atlantic Refining* have a very practical significance to gas consumers in Alabama. A large part of their supply comes from Southern Natural Gas Company (Southern), although other pipelines, including Transcontinental Gas Pipe Line Corporation (Transco), the pipeline purchaser in the instant case, also provide natural gas service in the state of Alabama. Prior to this Court's decision in *Atlantic Refining*, the Commission authorized producers in the southern Louisiana area to sell substantial volumes of gas to Southern, at prices of

22.8 cents per Mcf, in an uncontested, "short-form" proceeding. *Southern Natural Gas Co.*, 19 FPC 558 (1959). It observed casually in passing:

> "These proposed prices will be among the highest to be paid for natural gas in the southern Louisiana area." 19 FPC at 559.

After this Court's *Atlantic Refining* decision, the Commission has once again authorized, over the protest of its own Staff, new sales to Southern from the south Louisiana area and Mississippi at prices up to 23.7 cents including taxes.[1] This time the Commission did hold a hearing. It concluded, however, that since the initial price proposals were not "out-of-line" with others certificated by it before *Atlantic Refining* (at a time when its practice was to make no rate scrutiny in certificate proceedings), they should be made effective without further study.

To meet the increased costs of purchasing gas, Southern has filed two substantial rate increases since 1957.[2] If the decision of the Court below is left undisturbed as a precedent which permits the Commission to continue the authorization of new sales without requiring evidentiary support for the initial price levels proposed, the benefit of *Atlantic Refining* to consumers, including those represented here by the League, will be nullified. Each time Southern needs more gas its costs and rates will go up again, with no explanation of the "reason why" (360 U.S. at 393) such higher prices are required. The League is therefore vitally

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[1] South Georgia Natural Gas Co., Docket No. G-9892, Opinion No. 325, issued August 7, 1959. The Commission lost no time in citing the decision of the Court below in this case, issued three days earlier, to support its position (Opinion No. 325, mimeo. ed., p. 13).

[2] FPC Docket Nos. G-13,258 and G-18,512. Docket No. G-13,258, involved an annual increase of some $18 million, of which approximately $11 million was allowed in a Commission-approved settlement. Docket No. G-18,512 now pending, increases Southern's rates by about $10 million a year.

interested in seeing that the *Atlantic Refining* decision be reaffirmed by reversing the lower court's misinterpretation of it.

ARGUMENT

In this case the Court below has affirmed an order of the Federal Power Commission unconditionally authorizing new sales from south Louisiana at prices above those involved in the *Atlantic Refining* case, in which the Commission: (a) did not require producers to demonstrate that their initial price proposals were required by the present and future public convenience and necessity (see footnote 5, R.485); (b) held that consumer interests challenging such rates were required not only to demonstrate their unreasonableness, and that they had an adverse effect on the public interest, but also to prove the reasonableness of any alternative price proposal (R. 486 and 491); (c) failed to specify what criteria it used in determining whether there was "an adverse effect on the public" and concluded that a two-cent pipeline increase which resulted from unconditional authorization of the producer prices was not such an adverse effect (R.489); (d) expressed doubt as to the Commission's authority to impose an initial price condition (R.491-2); and (e) expressly stated that in any event it would not exercise its authority to act as a price administrator for the natural gas production industry (R. 493).

In approving this decision, the Court below was doubly in error. First of all, it disregarded this Court's mandate to the Commission in *Atlantic Refining* that initial price proposals "must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued," and the requirement that such proposals be subject to "a most careful scrutiny and responsible reaction." (360 U.S. at 391). Secondly, it applied an erroneous standard of judicial review by affirming an unreasoned administrative

decision, arrived at under a basic misapprehension of the law, and not supported by substantial evidence as to a vital element (price justification) which had to be considered.

Either error presents questions which justify the granting of the Writ in this case. The rapid increases in natural gas price levels on and offshore Louisiana (and in other areas), without any regulatory scrutiny as to their reasonableness, and without even a requirement by the Commission that at least part of the new higher price levels be charged conditionally, subject to refund whenever the rates are finally evaluated, has exposed gas consumers to substantial increases, which are now irretrievable. Unless this Court acts now, the unsound principle will be established that arms-length bargaining between a pipeline-purchaser which needs more gas to sell more gas and which can pass on increased cost of obtaining it to consumers, and a producer-seller which understandably extracts the top "market" price as determined by other non-regulated prices, is sufficient to support a finding that "the present and future public convenience and necessity" requires unconditional authorization of such sales. Without further guidance by this Court, the Commission will continue, without substantial deviation, its practice before the *Atlantic Refining* case; "arms-length" bargaining will be substituted for regulation and the consumer will continue to stand bare of any price protection. Whatever price the Commission finally approves on remand of the *Atlantic Refining* case will be of little concern to anyone except those immediately involved, because the large-volume sales at prices of 23.5 cents per Mcf authorized in these proceedings will establish the "market" level.

The failure of the Court to exercise a proper scope of review is of equal importance. Whether affirming or reversing an agency's decision, it is important that appellate courts not intrude on the areas entrusted by Congress to the

judgment of the administrative body. By evaluating the result reached rather than the underlying decisional process, the Court below has left unchallenged an agency decision which clearly conflicts in several important respects with a recent decision of this Court on the same general question. It is not surprising therefore that subsequent agency decisions likewise reflect a confused and erroneous application of this Court's decision, leading only to further litigation. In view of the heavy burden of administrative appeals in recent years, it is essential that courts devote their scrutiny to the reasons invoked by an agency and whether its findings have a rational basis in law and are supported by substantial evidence, rather than making their own evaluation of the record to determine whether the agency's conclusions, reached after unarticulated consideration and "weighing of all factors" is "not unreasonable." (See the decision of the Court below, Petition for a Writ of Certiorari Filed by the New York Public Service Commission, App. A-6). Otherwise judicial review becomes the same as another administrative appeal, and policies Congress intended to entrust to guidance by administrative agencies will instead be formulated by the courts. Moreover, effective administration of the Natural Gas Act, at this time "when ground rules of producer regulation are being evolved" makes it imperative for the Commission to issue reasoned decisions, arrived at upon a rational basis and supported by evidence, rather than making the bare statement that it has "weighed all factors" and arrived at a result.

The Alabama League of Municipalities files this brief *amicus curiae* urging that the petitions for certiorari be granted in this case because the decision of this Court in *Atlantic Refining* is a landmark case, of the utmost importance to all consumers of natural gas wherever situated in continental United States. Because it jeopardizes the re-

quirements that initial prices be subject to "careful scrutiny" and be supported by evidence of their necessity to the present and future public convenience and necessity, the decision of the Court of Appeals in the instant case has an importance far beyond the confines of this case, and we respectfully submit that the petitions for certiorari should be granted.

Respectfully submitted,

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Certificate of Service

I, J. Parker Connor, attorney for *amicus curiae* hereby certify that I have this day served upon the following-named parties a copy of the foregoing Motion For Leave to File Brief *Amicus Curiae* and Brief by depositing true and correct copies thereof in the United States mail, first class, postage prepaid, and airmail, postage prepaid, addressed as follows:

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